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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204897
Party	Plaintiff John G. Marino
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Attachments	Marino Response to Motion to Strike.pdf(119628 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application Serial No. 85411955
For the mark LAGUNA LAKES Published in the Official Gazette on February 28, 2012

Consolidated Opposition No: 91204897

91204941

JOHN GERARD MARINO
v.

LAGUNA LAKES COMMUNITY ASSOCIATION, INC.

JOHN GERARD MARINO'S
RESPONSE TO MOTION
TO STRIKE TRIAL TESTIMONY OF
GERARD MARINO, INCLUDING EXHIBITS

John Gerard Marino ("Marino") hereby responds to the Motion to Strike Trial Testimony of John Gerard Marino and states as follows:

1. Apparently, Laguna Lakes Community Association, Inc. ("LLCA") fears that they have no ability to win this proceeding on its merits as they continue to file dilatory Motions relating to claimed procedural deficiencies rather then attempt to address the claims on their merits. It is well settled that this Board and all courts in this country favor determinations of matters on their merits. "The law favors determination of cases on merits; and when circumstances dictate that a judgment by way of default or dismissal for failure to prosecute should be set aside, the Board will exercise its discretion under

Fed. R. Civ. P. 60(b) to reopen the case." *CTRL Systems, Inc. v. Ultraphonics of North America, Inc,* 1999 TTAB LEXIS 468 (Trademark Trial & App. Bd. August 17, 1999); *See also, Florists' Transworld Delivery, Inc. v. McAfee*, 1999 TTAB LEXIS 582 (Trademark Trial & App. Bd. October 6, 1999)("we are mindful of the importance of resolving actions on their merits whenever possible, rather than on procedural technicalities.").

2. In support of LLCA's dilatory Motion to Strike, it cites the cases: *Universal Furniture Int v. Welcome Industrial Corp.* and *Jules Jergensen/Rhapsoldy, Inc. v. Peter Baumberger* which are designated as non-precedential. Moreover, LLCA also cites to other cases such as Anita *Dhaliwal, Conagra* and National *Aeuronautics* that also lack any precedential designation. It is also well-settled that in accordance with TBMP Section 101.03, "Decisions which are not designated (as precedent) or which are designated for publication only in digest form, are not binding on the Board." *See, also, Corporacion Habanos SA v Rodriguez*, 99 USPQ2d 1873, 1875 n.5 (TTAB 2011)(although parties may cite to non-precedential cases, the Board does not encourage the practice); *In Re: Fiat Group Marketing & Corporate Communications, SpA,* 109 USPQ2d 1593 (TTAB 2014)(non-precedential decisions are not binding on the Board, but may be cited to and considered for whatever persuasive value they may hold).

3. LLCA seeks to strike the trial testimony of the opposer a primary

party to this case. Certainly, LLCA knew that Marino was going to testify at trial in this matter as he is a party and the primary witness for opposer. He was disclosed as a witness in Marino's Initial Disclosures on November 19, 2012. LLCA even took his discovery deposition on or about August 22, 2013. LLCA had ample opportunity to conduct discovery as to Marino's potential trial testimony and have no basis to now cry foul. Moreover, even if this tribunal believes that there was some procedural deficiency in the trial testimony of Marino, "Ultimately the Board is capable of reviewing the relevance and strength or weakens of the objected to testimony and evidence in this specific case, including any inherent limitations and this precludes the need to strike the testimony and evidence." *Hunt Control Sys. v. Koninklijke Philips Elec. N.V.*, 98 U.S.P.Q.2d (BNA) 1558 (TTAB 2011); *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2D (BNA) 1750 (TTAB 2013)("The Board does not ordinarily strike testimony taken in accordance with the applicable rules on the basis of substantive objections; rather, such objections are considered by the Board in the evaluation of the probative value of the testimony at final hearing."); *See also* persuasive authority, *Marshall Field & Co v. Cookies*, 25 USPQ2D (BNA) 1321 (TTAB 1992)("Inasmuch as it is not our practice to strike testimony depositions which were regularly taken, the Motion is denied.")

4. LLCA further complains that it could not effectively cross-examine

Marino since the main testimony taker was out of state and did not have access to the exhibits for Marino's trial testimony. It is not the fault of Marino, that counsel chose not to attend, in person, the trial testimony of Marino. There was an attorney present at the trial testimony on behalf of the LLCA who was provided with copies of each trial exhibit upon which Marino was examined. LLCA counsel did not ask in advance of the trial testimony to provide any trial exhibits by e-mail or fax. Moreover, at no time during the deposition did counsel on the phone bother to attempt to have all of the exhibits faxed or e-mailed to him. LLCA counsel was sorely unprepared to take the trial testimony of Marino and now wants to point fingers at the undersigned counsel when any issues really were due to LLCA counsel's lack of preparation. Finally, despite all of the complaints of LLCA, any claimed prejudice can be easily cured, by taking trial testimony of Marino during its trial period after they have had additional time to review Marino's trial exhibits.

5. Next LLCA complains about trial exhibits used by Marino. The vast majority of the complained about documents are exhibits that were previously produced but had new annotations placed on them by Marino for demonstrative purposes. The fact that Marino chose, for purposes of trial, to take previously produced documents and place annotations, as demonstrative aids, on them should not be objectionable. LLCA still had ample opportunity to cross-examine Marino about these annotations and have more opportunity to examine

Marino about these annotations during its own trial period. Next LLCA also complains about other documents which are public records which should also not be objectionable such as the very trademark applications filed by LLCA and print outs of documents from the Florida Division of Corporations filed by LLCA with the State of Florida. Many of the "internet printouts" used by Marino were merely online searches of other geographic areas using the "Laguna Lakes" name and these documents were not requested in any discovery request and would be admissible as general internet searches that the Trademark Office regularly relies upon to determine whether an applicant is entitled to trademark registration. All of the document used as trial exhibits were encompassed in the pretrial disclosures. Finally, despite all of the complaints of LLCA, any claimed prejudice can be easily cured, by taking trial testimony of Marino during its trial period after they have had additional time to review Marino's trial exhibits.

WHEREFORE, Marino requests that this Tribunal deny the Motion to Strike Trial Testimony of John Gerard Marino, Including Exhibits and for any other relief this Tribunal deems just and proper.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail on this 3 day of November 2014 to: Donna M. Flammang, Esq., Brennan Manna & Diamond, P.L., 3301 Bonita Beach Road, Suite 100, Bonita Springs, FL 34134.

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